IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Regular Second Appeal No.171 of 1997.
Judgment Reserved on: 13.11.2007

Date of decision: 30.11.2007.

Bartu .....**Appellant**

Versus

Uttam Chand & Others .....**Respondents**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellant: **Mr.N.K. Thakur, Advocate,**

For the Respondents: **Mr.Sanjeev Kuthiala, Advocate.**

Dev Darshan Sud,J.

This appeal has been preferred by the defendant against the judgment of the learned District Judge reversing the judgment and decree passed by the learned Sub Judge(2), Amb on 19.5.1992, dismissing the suit of the plaintiffs-respondents for possession of the suit land.

The respondents herein are the plaintiffs who instituted suit for possession of land to the extent of 7 Marlas as depicted in the site plan, forming a part of Khasra No.378, situated in village Hamboli, Tehsil Amb, District Una, H.P. The appellant-defendant had filed a

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement?***

counter claim for adverse possession and stated that he was in possession of this land.

The learned trial Court held that the defendant had not perfected his title by way of adverse possession, but at the same time held that the suit was not maintainable. The claim of the defendant for adverse possession was abandoned by him at the time of hearing of the suit. The case put up by the plaintiffs was that during settlement operation, Bartu defendant had connived with the staff and had raised some construction on the land in dispute. The plaintiffs never appeared in the witness box. Only one witness namely PW-1, Bishan Dass, who was draughtsman, appeared and proved site plan Ex.PW-1/A stating that there was one house which had been built on this land. The defendant, in evidence did not deny the ownership of the plaintiffs but deposed that he had raised construction on the land to the knowledge of the plaintiffs without their protest. This testimony was corroborated by his other witness. The learned trial Court held that there is a house which has been raised on $1^{-1/2}$ Marla of land which is subject matter of the dispute and that the plaintiffs, by their conduct had allowed the defendant to raise this house with full knowledge of this fact. For reaching this conclusion, the learned trial Court considered in detail evidence on record including the statements of the defendant and his witness on this

issue which evidence has gone un-rebutted. The suit was, accordingly, dismissed.

In appeal, the learned District Judge reversed the judgment of the learned trial Court holding that the plea of estoppel raised by the defendant was not substantiated from the record. The learned appellate Court notices that the plaintiffs did not step into the witness box, but that was not fatal to the case as *"there is nothing on record to suggest that as to what specific facts were to be elicited from the plaintiffs if they appeared in the witness box".*

The defendant is now in second appeal. This appeal was admitted on the following substantial questions of law:-

(1) What is the effect of non-appearance of the plaintiffs as their witness in the instant case?

(2) Whether the impugned judgment and decree is vitiated by the non-appearance of the plaintiffs inasmuch as evading cross-examination?

(3) Whether the principle of Section 115 of the Indian Evidence Act has rightly been considered and appled by the learned lower appellate Court more particularly when the plaintiffs have not appeared in the witness box?

(4) Whether the impugned judgment and decree is the result of mis-interpretation and mis-construction of the oral as well as documentary evidence?

(5) Whether in the instant case it is proved and established that the plaintiffs allowed the defendant to raise the construction considering

the land in reference not belonging to them?

Questions No.1 and 2:

On these questions, the learned appellate Court was in clear error in law in holding that it was not necessary for the plaintiff to have stepped into the witness box to prove his case. It has been held in number of cases by the Hon'ble Supreme Court that the non-appearance of the party as a witness to litigation is fatal to the case. ***See: Ishwar Bhai C.Patel @ Bachu Bhai patel*** *vs.* ***Harihar Behora & Anr., JT 1999(2) SC 250*** and ***Vidhyadhar*** *vs.* ***Manikkrao & Anr., JT 1999(2) 183.*** Similarly this Court in ***Tokha vs. Smt.Biru and opthers, AIR 2003 Himachal Pradesh 107,*** has follows this judgment subsequently again followed in ***Sita Devi vs. Mohinder Singh & Others, Regular Second Appeal No.74 of 1996, decided on 21.08.2007.***

It was not for the defendant to have spelt out what questions he had to put to the plaintiffs in cross-examination. Rather, it was the defendant's case which had to be established by cross-examining the plaintiffs. Merely submitting a spot map and a jamabandi does not prove the case of the plaintiffs. Surely, if the plea of estoppel, as pleaded, was to be established, this fact had to be elicited from the plaintiffs or from a person familiar with these facts who may have given evidence on behalf of the plaintiffs, who was conversant

with the facts personally and not as hearsay evidence. The fact whether the plaintiffs or anyone of them were aware about the construction, protested or stopped the defendant were matters of cross-examination. The testimony of the defendant having gone unrebutted, the learned trial Court was right in dismissing the suit. In the circumstances, these questions are answered in favour of the appellant and against the respondents. It is held that the non-appearance of the plaintiffs-respondents is fatal to the case. The suit, therefore, deserves to be dismissed.

Question No.3:

On the question of estoppel, the learned trial Court has held after a careful analysis of the evidence on record that the evidence of two witnesses namely; the defendant DW-1 and another resident of the village DW-2 Sant Ram, clearly establishes that the house was being raised on a part of the land without any objection from the plaintiffs. There is nothing on the record to suggest that this part of the testimony has been discredited in cross-examination or that the witnesses cannot be believed. The learned appellate Court, while dealing with this aspect, has brushed aside this finding by holding that the jamabandi does not show the possession of the defendants and that mere silence of one of the plaintiffs in not objecting or stopping the defendant from raising construction, does not lead to an

inference of estoppel. This finding of the learned District Judge cannot be sustained as the very fact of the deliberate absence of each of the plaintiff or any one of them from the witness box coupled with the fact that the testimony of the defendant has remained un-rebutted, clearly establishes that no objection having been raised by any of the plaintiff, no preventive action taken or if such action was taken, such facts have not been placed on record is fatal to the case of the plaintiffs.

It was only on a consideration of these facts which would elicit by examination-in-chief/cross-examination that the plea of estoppel could have been negatived or could be established on the evidence on record. The only conclusion which can be drawn is that the plaintiffs or a person familiar with the facts who could depose to the factual situation did not step into the witness box because in case he (they) did so, the evidence would not have supported their case. The learned District Judge was in clear error in ignoring the evidence of the defendant which had been un-rebutted.

This question is accordingly answered in favour of the plaintiffs and against the defendant.

In the facts and circumstances of the case, other questions need not be gone into. This appeal is allowed. The judgment and decree of the trial Court is

upheld. The judgment of the District Judge is quashed and set aside. There shall be no order as to costs.

November 30, 2007. **(Dev Darshan Sud)**
(aks) **Judge.**